



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
INTERNATIONAL ACTIVITIES

May 30, 2000

Commission for Environmental Cooperation
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H2Y IN9

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Attention: Ms. Janine Ferretti
Executive Director
Secretariat

Dear Ms. Ferretti:

Pursuant to Article 14.3 of the North American Agreement on Environmental Cooperation, enclosed is the response of the United States to the submission of the Methanex Corporation (SEM-99-001), which, by determination of the Secretariat (17 April 2000) was consolidated with submission SEM-00-002. As previously explained by letter and telecommunication to the Secretariat, due to exceptional circumstances. This response is being submitted 60 days after delivery (on 31 March 2000) of the Secretariat's determination that the submission merits a response. As we have discussed with Mr. Markell of your staff, a hard copy of the United States response, together with the annexes thereto, is being forwarded via an overnight courier service.

Best personal regards.

Sincerely,

A handwritten signature in black ink, appearing to read "William A. Nitze".

William A. Nitze
Assistant Administrator for International Activities
and Alternate Representative to the Council



**RESPONSE OF THE UNITED STATES OF AMERICA TO THE SUBMISSION MADE
BY THE METHANEX CORPORATION UNDER ARTICLE 14 OF THE NORTH
AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION**

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RESPONSE OF THE UNITED STATES OF AMERICA TO THE SUBMISSION MADE BY THE METHANEX CORPORATION UNDER ARTICLE 14 OF THE NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION

1. INTRODUCTION

This memorandum responds to a request from the Secretariat of the Commission for Environmental Cooperation (“CEC”) that the Government of the United States of America respond to a submission by the Methanex Corporation (“Methanex”) made under Article 14 of the North American Agreement on Environmental Cooperation (“NAAEC” or “Agreement”).¹ The United States notes that the Secretariat has consolidated Methanex’s submission with that of NESTE Canada, Inc. (“Neste”).² The Neste submission relied entirely on the Methanex submission, and did not contain any additional factual allegations. The Secretariat concluded that there was a “complete identity” of the matter involved in the Neste and Methanex submissions, and that the “two submissions relate to precisely the same facts and the same asserted failure to effectively enforce an environmental law.”³ Accordingly, the United States will confine this

¹ Methanex, “A Submission to the Commission on [sic] Environmental Cooperation Pursuant to Article 14 of the North American Agreement on Environmental Cooperation,” SEM-99-001, (October 14, 1999).

² Secretariat, “Determination in Accordance with Article 14(1) of the North American Agreement for Environmental Cooperation” (17 April 2000).

³ Given this identity, the Secretariat advised the United States that the time to respond to the consolidated submissions would run from the time of the Secretariat’s request (March 30, 2000) for a response to the Methanex submission. If the Neste submission had raised any issues beyond that raised by Methanex, a separate period for

memorandum to the Methanex submission, presuming that a response to Methanex's submission will *ipso facto* constitute a response to the consolidated submissions.

This memorandum serves to advise the Secretariat, in accordance with Article 14.3(a) of the Agreement, that the matter raised in the submission is the subject of a pending judicial or administrative proceeding. In accordance with Article 14.3(a), the Secretariat should proceed no further with the consideration of the submission. This memorandum also explains that California is effectively enforcing its environmental law.

Article 14 provides that submissions by non-governmental organizations or persons asserting that a Party is failing to effectively enforce an environmental law may, except as provided by Article 14.3(a), be considered by the Commission. If, following consideration of any response from the Party concerned, the Secretariat determines that a submission warrants the development of a factual record, the Secretariat is to inform the governing Council and provide reasons as to why a factual record is warranted. Pursuant to Article 15(2), the Secretariat shall prepare a factual record if the Council, by a two-thirds majority, instructs it to do so.

Before moving to the substance of our response, we wish to emphasize that the United States Government believes that the Articles 14 and 15 process is a critical component of the cooperative efforts for environmental protection among the Parties to the NAAEC. The United States has repeatedly been and continues to be a strong supporter of that process. Nevertheless, as the Secretariat has recognized, not all submissions merit development of a factual record.⁴

2. BACKGROUND

Methyl tertiary butyl ether ("MTBE"), a toxic chemical,⁵ is used mainly as a fuel oxygenate to comply with U.S. federal and state fuel programs, including the federal reformulated gasoline ("RFG") program.⁶ By statute, RFG must contain 2% oxygen by weight⁷ (equivalent to about 11% MTBE by volume). In comparison to other gasoline components, including benzene, toluene, ethylbenzene, and xylenes (collectively, "BTEX") that are of concern to public health or the environment, the available information shows that MTBE is capable of traveling through soil more rapidly, is significantly more soluble in water, and is highly resistant to biodegradation.⁸ In the environment, MTBE moves at nearly the same velocity as the groundwater itself, generally traveling farther than other gasoline constituents, making it more

response would have been required.

⁴ For instance, the Article 14 process is not intended to be a forum for seeking legislative changes to the nature and scope of a Party's environmental laws. *See* Letter from Victor Lichtinger to Jay Tutchton re: Submission SEM-95-001 (September 21, 1995). *See also* Determination Pursuant to Articles 14 & 15 of the NAAEC (Submission SEM-96-002, May 28, 1996) (Secretariat determining that a factual record was not warranted where there was ongoing litigation that could obviate the need to address the assertions in a factual record).

⁵ *See* <www.epa.gov/iris/subst/0545.htm#1.B>.

⁶ The Clean Air Act mandates that RFG be sold in the 10 largest metropolitan areas with the most severe summertime ozone levels. 42 U.S.C. § 7545(k)(10)(D). In California, these areas include Los Angeles, San Diego and Sacramento. RFG represents over 30% of the total retail gasoline sold in the United States and, although required only in about 70% of the retail gasoline sold in California, is used virtually everywhere in California. *See* California Environmental Protection Agency, MTBE Briefing Paper, September 3, 1998, at 3, 6 <<http://www.arb.ca.gov/cbg/pub/mtbebp.pdf>>.

⁷ Clean Air Act § 211(k)(2)(B), 42 U.S.C. § 7545(k)(2)(B).

⁸ EPA, Advance Notice of Proposed Rulemaking, 65 *Fed. Reg.* 16,097 (Mar. 24, 2000).

likely to contaminate public and private drinking water wells.⁹

Because of this MTBE's mobility in the environment, and because MTBE is highly resistant to biodegradation and remediation, gasoline releases with MTBE can be substantially more difficult and costly to remediate than other gasoline releases.¹⁰ Moreover, MTBE has a turpentine-like taste and odor that, even at extremely low levels of contamination, can render drinking water unpotable.¹¹ This is a substantial concern in California where approximately 30% of the population relies on groundwater as a source of drinking water.¹²

Each year, approximately nine million gallons of gasoline (the equivalent of a full supertanker) are released to the environment in the United States from leaks and spills.¹³ Release to the environment is not due solely to leaking underground storage tanks ("USTs"); there are opportunities for releases wherever gasoline is stored, transported, or transferred from one container to another. In addition, substantial releases to the environment can also result from the exhaust of personal watercraft.¹⁴

The State of California has experienced some of the worst and most widespread groundwater contamination from MTBE. There have been impacts on drinking water wells at dozens of sites in California, and from a variety of sources. For example, in 1995 the City of Santa Monica found high levels of MTBE in the wells that supplied approximately 50% of the city's drinking water, ultimately forcing these wells to be shut down.¹⁵ Cleanup in Santa Monica is expected to cost more than \$160 million.¹⁶ Similarly, in Glennville, California, residential drinking wells were contaminated with MTBE at levels up to 20,000 parts per billion, forcing the town to start using an alternative drinking water source.¹⁷ MTBE has also been detected in California surface waters (which sometimes serve as sources of drinking water) at locations such as at Donner Lake, and Shasta Lake, and Lake Tahoe.¹⁸ While many of the most dramatic instances of MTBE contamination have originated from leaking USTs, serious contamination has also resulted from pipeline spills, accidents (including traffic accidents), improper refueling, improper gasoline handling and disposal, other spills, watercraft exhaust, and even, to a lesser extent, surface runoff, earthquakes and atmospheric washout during precipitation events.¹⁹

⁹ *Id.*

¹⁰ *Id.*

¹¹ In controlled studies, individuals have detected MTBE in water at levels as low as 2.5 parts per billion ("ppb") (odor) and 2.0 ppb (taste). USEPA has issued a non-regulatory drinking water advisory, stating that keeping MTBE levels below 20-40 ppb would likely avert unpleasant taste and odors, recognizing that some people may detect concentrations below this level. 65 *Fed. Reg.* at 16,097.

¹² California Department of Water Resources, The California Water Plan Update BULLETIN 160-98, Nov. 1998, at ES3-5 <<http://rubicon.water.ca.gov/pdfs/b160cont.html>>.

¹³ Press release, "New Alliance Launches Consumer 'Gas Care' Campaign to Prevent Small Gasoline Spills.," (July. 27, 1999). *Cited at* 65 *Fed. Reg.* 16,098.

¹⁴ 65 *Fed. Reg.* at 16,101.

¹⁵ 65 *Id. Fed. Reg.* at 16,098.

¹⁶ *Id.*

¹⁷ 65 *Id. Fed. Reg.* at 16,099.

¹⁸ Reuter, J.E., et al., Concentrations, Sources and Fate of the Gasoline Oxygenate Methyl Tert-Butyl Ether (MTBE) in a Multiple-Use Lake., *Environmental Science and Technology.*, 32, 3666-3672 (1998), *cited at* 65 *Fed. Reg.* 16,098.

¹⁹ For example, the U.S. Department of Transportation estimates that, over a recent five year period (1994-1998), an average of 29 gasoline spills occurred annually from pipelines, with the total volume of gasoline released from pipelines averaging 1.03 million gallons per year. In California, according to data being compiled by the State Fire Marshal, since 1981 there have been approximately 300 pipeline releases from the nearly 8,500 miles of

Both the U.S. Environmental Protection Agency (“USEPA”) and the State of California are grappling with the complex issue of how to address MTBE contamination. Due to the potential for leaks and spills under a vast array of circumstances, no system of regulation – even with the most rigorous of enforcement – can be expected to eliminate gasoline releases completely. Because of the unique properties of MTBE (compared to BTEX) described above, releases of gasoline containing MTBE present a serious risk to the water resources in California and elsewhere. Both California and USEPA have recognized that the use of MTBE in gasoline presents unique environmental problems.²⁰ Moreover, both California and USEPA have recognized that the traditional approach for dealing with petroleum releases is unlikely to be sufficient to address MTBE contamination,²¹ and have suggested some similar alternatives for addressing MTBE problems — including an elimination or reduction in the amount of MTBE that may be used in gasoline. In March, 1999, Governor Gray Davis of California issued an executive order requiring the California Energy Commission to set a timetable for the removal of MTBE from gasoline sold in California no later than December 31, 2002.²² Similarly, after receiving recommendations from a Blue Ribbon Panel of experts,²³ USEPA, in an Advance Notice of Proposed Rulemaking,²⁴ suggested that MTBE in gasoline should be eliminated or significantly reduced nationally.

Methanex, a Canadian manufacturer of methanol, a primary ingredient of MTBE, opposes California’s strategy for addressing MTBE contamination. As described in more detail below, on June 15, 1999, Methanex filed a Notice of Intent to Submit a Claim to Arbitration under Chapter 11 of the North American Free Trade Agreement (“NAFTA”). The Claim itself was filed on December 3, 1999.²⁵ The Claim, which seeks to recover U.S. \$970 million in damages, asserts that the United States has breached, and continues to breach, certain obligations under Chapter 11 of NAFTA by reason of the California Governor’s eExecutive oOrder.²⁶ The principal basis

pipeline within the Marshal’s jurisdiction. Incidents in the state of Maine also indicate that even relatively small spills from automobile gas tank leaks can result in significant groundwater contamination (this would be true for other smaller releases as well, such as refueling, handling and disposal releases). Finally, gasoline transportation accidents, such as occurred in Lowell, Massachusetts, on January 28, 2000, can also result in MTBE contamination (the Lowell accident resulted in the temporary closure of drinking treatment facilities in the cities of Tewksbury and Lawrence). *See generally*, 65 *Fed. Reg.* 16,094, 16,099-100.

²⁰ *See* 65 *Fed. Reg.* 16,094 (United States Mar. 24, 2000)

<<http://www.calepa.ca.gov/programs/mtbe/epcresolution.htm>> (California).

²¹ Because spills of conventional gasoline typically move slowly through groundwater, and are biodegraded over time, many are left in place to undergo bioremediation or natural attenuation. However, MTBE moves rapidly with groundwater, is not readily degraded in the groundwater environment, and can render groundwater unpotable at very low concentrations. Therefore, spills involving MTBE require much more aggressive management and remediation than do spills of conventional gasoline. 65 *Fed. Reg.* 16,102; *see also* State Water Resources Control Board, Guidelines for Investigation and Cleanup of MTBE and Other Ether-Based Oxygenates (Mar. 27, 2000) <http://www.swrcb.ca.gov/cwphome/ust/mtbe_finaldraft.pdf> (“MTBE Guidelines”).

²² California Executive Order D-5-99, March 25, 1999,

<<http://www.governor.ca.gov/briefing/execorder/d599.html>> (“Executive Order”).

²³ The Blue Ribbon Panel Report is available at

<<http://www.epa.gov/otaq/consumer/fuels/oxypanel.blueribb.htm>>.

²⁴ 65 *Fed. Reg.* 16,094 (March 24, 2000).

²⁵ Methanex, Notice of Submission of a Claim to Arbitration Under the Arbitration Rules of the U.N. Commission on International Trade Law and the North American Free Trade Agreement (hereinafter, the “Claim”). The Claim appears as Annex 1 hereto.

²⁶ The Claim also attacks as a part of the “measure” at issue a California legislative bill which, according to Methanex, “called for the University of California to do a thorough and objective evaluation of the human health and environment risks and benefits, if any, of the use of MTBE, ethyl tertiary-butyl ether (‘ETBE’), tertiary amyl methyl

of the Claim appears to be that California should control MTBE by enforcing its laws on underground gasoline storage tank, rather than by banning the use of MTBE in gasoline. On October 14, 1999, in the interim between filing its notice of intent to arbitrate and the actual claim, Methanex filed the instant submission under Article 14, stating that “Methanex is concerned with the harm which has been, and continues to be, caused to the environment by California’s failure to enforce its environmental laws.”

The submission asserts that (1) “the State of California and/or the United States has failed to enforce California’s environmental laws and regulations related to water resource protection and to the regulation of USTs,” and (2) “the State of California has failed to properly protect water resources by not regulating all USTs.” Methanex cited two sources of California law and two sources of U.S. federal law that allegedly were not being enforced. The Secretariat concluded that the second assertion – failure to regulate all categories of USTs – is beyond the scope of Article 14, and did not consider it further.²⁷ In addition, the Secretariat concluded that the submission does not provide sufficient information concerning the federal statutes cited by Methanex.²⁸ Accordingly, this memorandum will address only the allegations that California has failed to enforce its environmental laws related to USTs and water resources.

3. SUMMARY OF DISCUSSION

In this case, preparation of a factual record based on the assertions in the submission is not appropriate for two principal reasons. First, the matter is the subject of a pending international dispute resolution proceeding to which the United States is a party. In such circumstances, the Agreement dictates that the Secretariat shall proceed no further. Article 14.3(a), as elaborated by Article 45.3(b), specifically precludes the preparation of a factual record where the matter submitted is the subject of an international dispute resolution proceeding involving the same Party. In this case, Methanex is already challenging California’s enforcement of its UST regulations as part of its arbitration claim against the United States under NAFTA Chapter 11. Because the issue of California’s enforcement of its UST regulations has been raised before the international arbitral tribunal convoked to address Methanex’s Chapter 11 claim (a qualifying proceeding under Article 45.3(b)), development of a factual record is proscribed by Article 14.3(a). Moreover, it is apparent that Methanex’s sole interest is in furthering its NAFTA Chapter 11 arbitration claim, a purpose that is inconsistent with the spirit as well as the letter of Article 14. The Parties did not intend that the Articles 14 and 15 process be used to advance or prejudice parallel proceedings under the NAFTA.

Second, there is substantial evidence that California is in fact vigorously and effectively enforcing its law pertaining to underground storage tanks and water resources.

4. THE SUBJECT MATTER OF THE SUBMISSION IS THE SUBJECT OF A PENDING JUDICIAL OR ADMINISTRATIVE PROCEEDING; THEREFORE THE SECRETARIAT CAN PROCEED NO FURTHER.

ether (‘TAME’) and ethanol, in gasoline and to ensure that the air, water quality and soil impacts of the use of MTBE were fully mitigated.” Claim at 6.

²⁷ Secretariat Determination (30 March 2000) at 4.

²⁸ California UST statutes and regulations are a matter of State law only and are not subject to enforcement by the federal government.

1. Pertinent NAAEC Provisions

Article 14.3 of the NAAEC provides, in pertinent part:

The Party shall advise the Secretariat within 30 days or, in exceptional circumstances and on notification to the Secretariat, within 60 days of delivery of the request:

(a) whether the matter is the subject of a pending judicial or administrative proceeding, in which case the Secretariat shall proceed no further;

Article 45.3 defines “judicial or administrative proceeding” for purposes of Article 14.3 to include:

(b) an international dispute resolution proceeding to which the Party is party.

2. The Methanex Chapter 11 Proceeding

Methanex’s claim against the United States under Chapter 11 of the NAFTA asserts that the United States has breached, and continues to breach, certain obligations under Chapter 11 of NAFTA by reason of the Governor of California’s issuance of an executive order announcing an intent to phase out the use in California of MTBE as a gasoline additive. The “particulars” of the Cclaim are that the “measure” allegedly undertaken by California’s Governor:

“i. was arbitrary and based on a process which lacked substantive fairness;
ii. penalizes and bans only one component of gasoline;
iii. *failed to consider alternative measures to mitigate the effects of gasoline releases into the environment;*
iv. *resulted from the failure or delay in enacting or enforcing legislation to reduce or eliminate gasoline releases into the environment;*
v. failed to take proper consideration of the legitimate interests of Methanex, Methanex US and Methanex Fortier; and
vi. goes far beyond what is necessary to protect any legitimate public interest.”²⁹

Methanex argues that these alleged “particulars” constitute violations of NAFTA Article 1105 (“minimum standard of treatment”) and Article 1110 (expropriation).

Methanex’s Chapter 11 Statement of Claim devotes considerable attention to California UST law, and relies on a California State Auditor’s report (the same report that is the basis for the Article 14 submission) as evidence of the State’s “flawed regulatory process” and “failures in respect of UST legislative enforcement.”³⁰ The arbitration is proceeding: as of May 30, 2000, the arbitral panel has been selected but has not yet met.

²⁹ Methanex Claim at 7 (emphasis added).

³⁰ Methanex Statement of Claim (Schedule 2), paras. 17 and 18.

3. Discussion

1. The Chapter 11 Proceeding Is a “judicial or administrative proceeding” Within the Meaning of Article 14.3(a).

As defined in Article 45, “judicial or administrative proceeding” explicitly includes an international dispute resolution proceeding to which the Party is a party. The arbitral proceeding initiated by Methanex against the United States is a dispute settlement proceeding pursuant to NAFTA Chapter 11, and thus is an international dispute resolution proceeding.³¹ The United States is a party to the Chapter 11 proceeding. Thus, the arbitration is a “judicial or administrative proceeding” within the meaning of Article 14.3(a).

2. The Subject Matter of the Submission is the Subject of the NAFTA Chapter 11 Proceeding.

An essential element of Methanex’s Chapter 11 claim as pleaded is that instead of phasing out the use of MTBE in gasoline, California should adopt and enforce legislation to prevent gasoline and MTBE leaks from USTs. The Claim goes into considerable detail on California law relating to USTs, and recites the same findings of the California State Auditor³² that are quoted at length in the Article 14 submission. The Claim’s principal argument appears to be that in light of the State’s alleged failure to enforce UST requirements, California’s decision was arbitrary and capricious, failed to consider alternative measures (i.e., enforcement of UST regulations), and failed to take into account the economic interests of corporate manufacturers of MTBE feedstocks.³³ These failings, according to Methanex, amounted to violations of Chapter 11. Thus, the same factual issue – California’s alleged failure to enforce its environmental laws – is pivotal to both Methanex’s Chapter 11 claim as pleaded and its Article 14 submission. Thus, “the matter” of the Article 14 submission – whether California effectively enforces its UST laws – is the subject of a pending judicial or administrative proceeding, i.e., the NAFTA Chapter 11 proceeding.

This conclusion is reinforced by the fact that the “Summary” portion of the Article 14 submission includes a lengthy paragraph devoted to the Governor’s Executive Order on the phase-out of MTBE. Methanex there complains that the Order “treats a symptom (MTBE) of gasoline leakage, rather than the leakage itself, deflecting attention from the State’s failure to enforce its environmental laws.”³⁴ Methanex thus argues in both its Article 14 submission and Chapter 11 claim that California should address MTBE contamination not by a ban but by improving its enforcement of UST regulations.

It is readily apparent that MTBE – and not UST enforcement in California – is the real concern of Methanex, a Canadian corporation that manufactures the primary feedstock of MTBE. Ironically, Methanex is attempting to use the “adequate enforcement” provisions of Article 14 of the NAAEC not to further enforcement of California environmental law, but in order to promote

³¹ See NAFTA Chapter 11, Section B, “Settlement of Disputes between a Party and an Investor of Another Party.”

³² Methanex Statement of Claim (Schedule 2), paras. 17-18.

³³ Methanex Claim at 7.

³⁴ Methanex submission at 3.

its own financially self-interested challenge to the legitimacy of the State's environmental decisionmaking on the regulation of MTBE. The CEC must not permit the Article 14 process to be transformed into a tool to further investors' arbitration claims that attack legitimate environmental protection measures.

Finally, to further entertain Methanex's submission would frustrate the intent of Parties as expressed in Article 14.3(a). The Agreement expressly states the Parties' intention that the Secretariat should not pursue submissions on matters that are already the subject of existing "judicial or administrative proceedings," including international dispute settlement proceedings. Indeed, as reflected in Article 45.3, the exception for international dispute settlement proceedings is cast in broader and more categorical terms than for domestic proceedings. (*Compare* Article 45.3(a) with 45.3(b).) If this submission were to proceed to the development of a factual record, both the Secretariat and the Chapter 11 arbitral panel would be investigating the same facts and considering the same issues at the same time.

Apart from the need to conserve the Secretariat's scarce resources, an investigation and development of a factual record by the Secretariat carries the obvious potential of interfering with the ongoing arbitral proceeding. This is particularly true where, as here, the principal submitter is the same party who initiated the arbitral proceeding and is apparently attempting to commandeer the Article 14 process to bolster its NAFTA claim. Article 14.3 was intended, in part, to prevent private litigants such as Methanex from using the Article 14 process as an alternative mechanism for obtaining information that would be useful in certain types of other proceedings.

Allowing the submission to proceed in this instance would effectively turn the Article 14 process into a discovery tool for a private investor in a NAFTA Chapter 11 arbitration. Such a result was not intended by the Parties and would subvert the purpose of Articles 14 and 15, which is to promote environmental protection in North America.

5. CALIFORNIA ENFORCES ITS ENVIRONMENTAL LAWS PERTAINING TO UNDERGROUND STORAGE TANKS.

1. Introduction

Even if Article 14.3(a) were not a bar to further consideration of the submission, there would be no need to prepare a factual record in light of the lack of specificity in the allegations of the submission and the substantial evidence documenting California's robust enforcement of its UST program. The submission sweepingly asserts that California has failed to effectively enforce California's environmental laws relating to water resource protection and concerning underground storage tanks. But Methanex has nowhere identified the specific California environmental laws or regulations concerning water resource protection and USTs that the State has allegedly failed to effectively enforce. Instead, the submission relies on a two-year old report on California's UST regulatory program prepared by the California State Auditor³⁵ that primarily identified mechanisms for improving California's UST and water protection laws. Many of the State Auditor's conclusions are not appropriate for consideration under the Articles 14 and 15 process, or have been remedied in the intervening two years. The Auditor's conclusions cited

³⁵ California State Auditor, Report 98112, "California's Drinking Water," December 1998 ("State Auditor's Report").

by Methanex are discussed individually below.

Enforcement of environmental regulations on USTs is a complex and challenging task. More than 50,000 storage tanks are buried in California's 58 counties. USTs are by definition underground and therefore difficult to observe and to monitor. Being in the ground, they are subject to the shifting and settling of the soil (including but not limited to that caused by earthquakes), and thus to stresses that result in unauthorized releases from the USTs and connected underground piping. Even the most zealous enforcement program cannot prevent all leaks from USTs, and may require substantial time to remedy the effects of leaks. The Governor's recognition that leaking USTs are a major source of MTBE contamination is not, as Methanex contends,³⁶ an admission that California does not effectively enforce its UST laws. Instead, it is a recognition that a certain amount of UST leakage is inevitable, despite the State's protective UST requirements and aggressive response to leaks.

As explained further below, at least 94 regulatory agencies enforce California's UST laws. The various regulatory agencies have been and are continuing to vigorously pursue investigatory, prosecutorial, regulatory, and compliance measures. Summaries of ongoing enforcement actions in certain counties are provided below in tabular form. Due to the decentralized nature of the regulatory system in California (a vast state with a population exceeding 33 million), it has not been possible in the time available to assemble and present a complete list of pending enforcement actions in the State. However, the efforts discussed below provide a representative picture of the State's commitment to enforcement of UST and related water resources regulations.

2. Legal and Administrative Framework

1. Legal Framework

California has a diverse and comprehensive system for the regulation of USTs, which is more fully described in the attached summary by the State of California (Annex 2).³⁷ The Porter-Cologne Water Quality Control Act,³⁸ California's principal law on water quality, tasks the State Water Resources Control Board ("State Water Board") with responsibility for setting water policy. Of particular importance, the State Water Board has adopted Resolution 92-49, Policies and Procedures for Investigation and Cleanup and Abatement of Discharges under Water Code Section 13304.³⁹ Resolution 92-49 (para. 23) acknowledges the State Water Board's existing regulations governing investigation and corrective action at UST sites. Further, the State's policy is that investigations and corrective action at UST sites shall be in conformance with the State Water Board's regulations for the investigation and cleanup and abatement of discharges of hazardous substances from USTs.⁴⁰ In essence, the State Water Board has duly adopted policy that says that conformance with the applicable UST regulations governing cleanup and abatement satisfies requirements for complying with the Porter-Cologne Act. Accordingly, although the submission refers to unspecified "regulations relating to water resource protection," the only requirements pertinent to the submission are the laws and regulations on USTs.

³⁶ Methanex submission at 3, 12-13.

³⁷ Annex 2 sets forth citations to the relevant California laws and regulations. Only the major citations are included in this Memorandum.

³⁸ Cal. Water Code, § 13000 *et seq.*

³⁹ <<http://www.swrcb.ca.gov/plnspols/wqplans/rs92-49.htm>>.

⁴⁰ Resolution 92-49, ¶para. III.F.3

Although never identified in Methanex’s submission, California’s laws governing USTs are codified in the California Health and Safety Code. The laws are divided broadly between those laws intended to prevent leaks from USTs (the “UST Law”) and those intended to respond to leaks from USTs⁴¹ (“Cleanup Fund Act”). The State Water Board has adopted regulations to implement the UST Law,⁴² as well as the corrective action requirements of the UST Law, and the Cleanup Fund Act (“Corrective Action Regulations”).⁴³ Because State water policy, through Resolution 92-49, identifies the Corrective Action Regulations as the basis for investigating releases from USTs, the Corrective Action Regulations provide the pertinent requirements for evaluating whether California effectively enforces its laws concerning water resource protection.

The submission also references the California Department of Health Services (DHS).⁴⁴ However, DHS does not regulate USTs, and does not have authority to direct the investigation and the clean up of releases from USTs. Instead, DHS’s responsibility is to ensure that the water delivered by public drinking water systems meets minimum public health and safety requirements.⁴⁵ In this capacity, DHS sets standards for water that may be delivered by water systems, and requires monitoring of public drinking water systems to ensure that it meets the standards dictated by the California Safe Drinking Water Act. Releases from a UST may contaminate a drinking water source and require the supplier, after the water is extracted from the source and before it is delivered, to treat the drinking water so that it meets the California Safe Drinking Water Act; however, any actions to investigate and remedy the UST contamination will occur pursuant to the Corrective Action Regulations.⁴⁶

2. Administrative Framework

The administrative framework in California for implementing and enforcing laws governing USTs is described in detail in Annex 2. To summarize, the primary responsibility for enforcement lies with local and regional agencies. California’s UST leak prevention program is included in the State’s unified hazardous waste and hazardous materials regulatory program (“Unified Program”). Certified Unified Program Agencies (“CUPAs”) are local agencies certified by the Secretary for the California Environmental Protection Agency (“Cal/EPA”) to have responsibility for implementing the Unified Program. Currently, California has 69

⁴¹ Cal. Health & Saf. Code, § 25299.10 *et seq.* Separate authority to develop regulations for responding to UST leaks also exists in the UST Law. *See*, Cal. Health & Saf. Code, §§ 25299.3, 25299.7(c).

⁴² Chapter 16 (commencing with section 2610), division 3 of title 23 of the California Code of Regulations (“UST Regulations”).

⁴³ Article 11 (commencing with section 2720), chapter 16, division 3 of the California Code of Regulations. Corrective action encompasses those activities necessary to investigate and remediate a release of substances from a UST or UST system. Cal. Health & Saf. Code, § 25299.14; Cal. Code Regs., tit. 23, § 2720.

⁴⁴ Methanex submission at 10-11.

⁴⁵ Cal. Health & Saf. Code, § 116270 *et seq.* (“California Safe Drinking Water Act”).

⁴⁶ As a result, the submission’s assertions regarding DHS are misplaced. Methanex submission at 10-11. The submission only cites the California Water Code and the UST Regulations as the environmental laws allegedly not being enforced. Methanex submission at 4. DHS does not have the authority to regulate water resources under either the California Water Code or the UST Regulations, and does not regulate drinking water under the Water Code. Moreover, only one assertion carried forward from the State Auditor’s Report involves DHS enforcement of environmental laws, and that assertion concerns whether or not DHS “follow[s] up on corrective actions taken by district officers and local agencies.” Methanex submission at 10-11. As noted in the State Auditor’s Report, however, DHS was already taking steps to address the Auditor’s concerns in December 1998. State Auditor’s Report at R-12-13.

CUPAs.⁴⁷ In the 15 counties where Cal/EPA has yet to certify a CUPA, cities and counties retain jurisdiction to implement the UST Law. These 84 local agencies have independent authority for enforcing the UST Law and UST Regulations.

In addition to the CUPAs and local agencies responsible for UST leak prevention, the UST Law authorizes the State Water Board to enter into agreements with local agencies to establish local oversight programs (“LOPs”) by which the local agencies can oversee the cleanup or abatement of releases from USTs.⁴⁸ The LOP process permits local agencies (which includes CUPAs, counties, or cities) to enter into agreements with the State Water Board whereby the local agency may oversee the investigation and abatement of a release from a UST. Although local agencies may include CUPAs, the LOP and CUPA processes are distinct and the State Water Board has not executed LOP agreements with all the CUPAs. Currently, the State Water Board has LOP contracts with 20 local agencies. In those locales not covered by LOP contracts, the local agencies may still oversee investigation and abatement efforts but Regional Water Quality Control Boards (“Regional Water Boards”)⁴⁹ have primary responsibility if a release may affect groundwater.

Although the State Water Board provides guidance on enforcement, primary responsibility for enforcing the UST Laws is at the local level. Local agencies maintain permits and are responsible for inspecting facilities.⁵⁰ Decisions to enforce are made locally, prosecuted within the administrative framework of the local agency, or referred by the local agency to its city attorney, county counsel, or district attorney. In multi-jurisdictional and other unusual cases, the California Attorney General may also prosecute violations of the UST Law and UST Regulations.

City attorneys and district attorneys are authorized to bring actions seeking civil penalties or criminal fines for violations of the UST Law by an owner or operator of a UST. Courts may impose civil penalties for operating a UST without a permit and for failing to comply with the provisions of the law regarding monitoring, maintaining records, reporting unauthorized releases, repair, closure, and other requirements. Courts may impose criminal penalties for falsifying of monitoring records and for knowing failure to report an unauthorized release. In addition both city and district attorneys have broad authority to seek injunctive relief on behalf of the city or county that which they represent against any person who has engaged in, is engaged in, or is about to engage in any action or practices that which violate the law, applicable regulations, permit terms, or other standards, requirements, or orders issued, adopted, or executed pursuant to the law.

3. Enforcement and Compliance Efforts

The discussion that follows is based on only a representative sample of on-going enforcement actions. The picture is not complete because not all the local regulatory agencies have had an opportunity, in the time frame allowed by NAAEC Article 14.3, to collect and to provide information about on-going enforcement to the State Water Board.

⁴⁷ <<http://www.calepa.ca.gov/programs/regreform/cupalist.htm>>.

⁴⁸ Cal. Health & Saf. Code, § 25297.1.

⁴⁹ The Porter-Cologne Act divides California into nine regions and establishes a Regional Water Board for each region. Cal. Water Code, § 13200 *et seq.* The Regional Water Boards are responsible for implementing and enforcing the Porter-Cologne Act and the Corrective Action Regulations within their respective jurisdictions.

⁵⁰ Cal. Health & Saf. Code, §§ 25285, 25288.

California's UST regulatory agencies rarely, if ever, file a judicial action without providing a responsible party an opportunity to resolve the matter administratively. Any administrative resolution necessarily entails coming into compliance with the applicable UST Law, UST Regulations, and Corrective Action Regulations. The enforcement actions described in this section involve sites where the regulatory agency has already pursued its administrative options and could not resolve the manner administratively. As a result, these actions have been referred to either the local district attorney, city attorney, or the California Attorney General, or the case is being investigated and prepared for referral. These enforcement actions therefore represent only a subset of the instances in which California agencies have sought to enforce UST regulations through administrative means.

1. On-going Enforcement Actions

California's on-going enforcement actions have been broadly classified as leak prevention or leak response activities. Leak prevention enforcement actions are those actions based on the UST Law and UST Regulations. These actions are designed to prevent leaks in the first instance and include enforcement for failing to upgrade or install USTs lawfully, failing to monitor a UST, and failing to lawfully close a UST. Leak response actions are primarily based on enforcing the Corrective Action Regulations and the directives issued by regulatory agencies pursuant to the Corrective Action Regulations. Leak response actions also include the failure of a UST owner or operator to report a unauthorized release as required by the UST Law and UST Regulations.

1. Leak Prevention

Preventing leaks in the first instance is the preferred approach for protecting California's water resources from petroleum, MTBE, and other hazardous substances stored in USTs. California's detailed regulations on the construction, installation and maintenance of USTs are described in Annex 2. To summarize briefly, California's UST Law prohibits a person from owning or operating a UST except in compliance with a permit issued pursuant to the UST Law and UST Regulations. Under the Law, USTs installed on or before 1984 had to be upgraded or replaced by December 22, 1998, to prevent releases due to corrosion or spills or overfills. All USTs installed on or after January 1, 1984, must meet California's requirements for design, construction, and installation, including a secondary containment system around the tank and its connected piping.⁵¹ The requirements are intended to provide protection against unauthorized releases into the environment due to manufacturing defects, improper installation, structural failure, or corrosion.

California employs a series of requirements to ensure that tanks and piping are properly installed. All USTs must be tested at the factory before being transported to ensure that they were constructed in accordance with the standards under which they were built. All tanks must be tested for tightness at the installation site before installation. All secondary containment must pass a post-installation test that meets the local agency's approval. Tanks must be tested following installation and prior to use to ensure that no damage occurred during installation. All

⁵¹ Cal. Health & Saf. Code, § 25291. For motor vehicle fuel USTs installed between January 1, 1984, and January 1, 1997, the Legislature allowed enhanced protections (e.g., fiberglass, cathodic protection, and fiberglass-wrapped steel) in lieu of full secondary containment. Cal. Health & Saf. Code, § 25291(a)(7).

USTs must be installed according to a code of practice developed in accordance with voluntary consensus standards and the manufacturer's written installation instructions. The owner or operator must certify that a qualified, licensed installer performed the installation and that the installation was properly inspected.

A UST's operator must maintain records of monitoring, testing, repairing, and closure in sufficient detail to enable the local agency to determine whether the UST system is in compliance with the State UST Law and Regulations and with the conditions of the operating permit. Written records of all monitoring and maintenance must be maintained for three years, and must be made available, upon request, within 36 hours to the local agency or State Water Board. Release detection system performance claims and calibration and maintenance records must be maintained for 5 years. Records of repairs and upgrades must be maintained for the remaining life of the UST tank.

All regulated USTs in California have been subject to monitoring requirements since July 1, 1985. Tanks and pipelines must be monitored according to a method approved by the State. A specific leak detection program will consider the construction of the UST and piping and substance stored (i.e., new or existing tank, steel or corrosion resistant material, suction or pressurized piping, hazardous substance or motor vehicle fuel).

As previously indicated, local agencies are responsible for implementing and enforcing the UST leak prevention requirements. To carry out enforcement and inspection requirements, the local agencies collect fees for the issuance of UST permits. These fees are designed to cover the costs of implementing the UST program, including administering, permitting, and inspection. When a local agency is unable to effectively enforce UST laws using the available administrative tools, it refers the matter to the district attorney or city attorney as appropriate.

In the time available to prepare this Memorandum, California was able to compile information about on-going enforcement actions in 14 of California's 58 counties. California solicited this information by contacting the State's district attorneys' offices about on-going enforcement activities related to UST leak prevention. Therefore, the summary information reflects on-going enforcement activities elevated above the administrative level. In summarizing the enforcement actions, each county provided information for enforcement actions against a person. If the person operates multiple UST sites in a county and enforcement is proceeding based on conduct at more than one of the person's UST sites, the enforcement activity is only counted once for purposes of this response.

Total on-going administrative and judicial actions identified:83
Number of above actions referred to district attorney or Attorney General:77
Number of above actions with on-going judicial proceedings:14

The nature of the on-going enforcement actions varies by site and by county. For example, the Orange County District Attorney's Office currently has 37 UST leak prevention cases. These cases range from small, single-station defendants to large companies with at least 42 sites. Many of the actions concern irregularities with or outright noncompliance with the December 22, 1998, UST upgrade requirements. Other cases concern a failure to comply with the UST Law's monitoring and reporting requirements. For example, Kern County, a large county in California's central valley, has 11 active referrals in its district attorney's office, but Kern County's actions are primarily against small stations. In addition to the previously

mentioned counties, the State’s district attorneys and city attorneys have informed the State Water Board about active UST prosecutions underway in Alameda, Amador, Calaveras, Madera, Merced, Nevada, Sacramento, San Francisco, Santa Cruz, and Tulare counties. Moreover, the Los Angeles County Department of Public Works is preparing a substantial matter for referral to its district attorney. All these actions are in addition to a statewide civil investigation by the California Attorney General of potential, widespread misreporting of upgrade compliance information by a large oil company with hundreds of gasoline stations statewide.

2. Leak Response and the UST Cleanup Fund

California has made a substantial commitment to enforcing its UST laws and in particular to ensuring that responsible parties remediate releases from USTs. Under California law, when a local agency, a Regional Water Board, or the State Water Board becomes aware of a release from a UST, the agency issues a directive to investigate the release. Local agencies and Regional Water Boards submit information about each site to the Leaking Underground Storage Tank Information System (LUSTIS). Each leaking UST that has not received a no further action letter⁵² is a pending administrative action tracked in LUSTIS.

As of March 31, 2000, LUSTIS indicates that there are 15,783 open UST cases.⁵³ Each of these 15,783 cases is an open enforcement case. Of these cases, 12,173 sites have a confirmed release from a UST that is subject to the enforcement agency’s jurisdiction. The enforcement agencies are tracking these cases and requiring corrective action as appropriate. California’s Corrective Action Regulations adopt a phased approach to corrective action. Each phase in the corrective action process is reviewed and subsequent work then directed by the regulatory agency. According to the LUSTIS database, the 12,173 cases with confirmed releases fall into the following phases of work:

Phase	Number of Sites
Preliminary Site Assessment Workplan Submitted	2,058
Preliminary Site Assessment Underway	3,284
Pollution Characterization	3,433
Remediation Plan	1,050
Remedial Action Underway	1,447
Post-Remedial Action Underway	901

California has committed substantial resources to ensure the aforementioned LUSTIS sites are properly regulated and remediated. For its 1999-2000 fiscal year,⁵⁴ the State Water Board will provide more than \$10.5 million for LOP agencies. As explained previously, LOP agencies are responsible for overseeing the investigation and cleanup of UST releases. This

⁵² A no further action letter, sometimes referred to as a closure letter, indicates that investigation and clean up have been completed pursuant to the Corrective Action Regulations and to the satisfaction of the regulatory agency. Cal. Health & Saf. Code, § 25299.37(h).

⁵³ <<http://www.swrcb.ca.gov/cwphome/lustis/LUSTQ100.PDF>>.

⁵⁴ California’s fiscal year commences on July 1 and runs through June 30 of the following year.

represents a \$1.3 million (or 14%) increase from the \$9.2 million expended in the 1998-1999 fiscal year. For fiscal year 2000-01, the State Water Board projects it will provide \$12.2 million in support of LOP agencies. All told, the State Water Board has committed \$27 million to regulatory oversight of UST cleanup efforts for fiscal year 1999-2000. None of these figures include the millions more spent at the local level to enforce the UST leak prevention laws.

In addition to enforcement and oversight funding, California has established a powerful tool to encourage compliance with the UST Law and UST Regulations, while also providing a mechanism to respond to releases from USTs. In fiscal year 1999-2000 the State Water Board will provide approximately \$170 million for the investigation and cleanup of historical releases from USTs. The State Water Board will provide the \$170 million⁵⁵ pursuant to the Cleanup Fund Act, which establishes a mechanism to reimburse owners and operators of USTs that are in compliance with the applicable UST Law and UST Regulations.⁵⁶ The Cleanup Fund helps assure that monies are available to remediate releases from USTs by permitting reimbursement of up to \$1.5 million per occurrence, and thereby helps protect California’s water resources. Further, by predicating reimbursement from the Fund upon compliance with applicable laws, the Cleanup Fund Act provides a strong incentive for persons to comply with the UST Law and UST Regulations. These monies are all part of an on-going effort on California’s part to effectively enforce its UST Law and protect California’s water resources.

In addition to the 15,783 administrative enforcement actions identified in LUSTIS, the State Water Board has compiled information concerning the following on-going enforcement actions.

Total on-going judicial actions identified:	23
Number of above actions referred to district attorney or Attorney General:	23
Number of above action with on-going judicial proceedings:	9

The State Water Board has received information about on-going leak response actions from 10 of California’s counties, including Alameda, Del Norte, Humboldt, Nevada, Orange, Plumas, Sacramento, Trinity, and Tulare counties. In each case, the local agency has referred the matter to a district attorney or city attorney because a responsible party failed to comply with agency directives to investigate and abate a release from a UST. As before, the actions involve both large and small operators, with some defendants having as many as 32 sites.

2. Recent Enforcement Actions

In addition to on-going enforcement actions, Cal/EPA receives data about historical UST enforcement activities that show a marked increase in enforcement activities since the State Auditor’s Report. Because of the CUPA reporting requirements, the information compiled by Cal/EPA does not distinguish between leak prevention and leak response UST enforcement. Set forth below are summary tables of enforcement actions undertaken by California’s CUPAs in the two most recent fiscal years.⁵⁷ Statewide in fiscal year 1997-1998, California’s CUPAs

⁵⁵ <<http://www.swrcb.ca.gov/cwphome/ustcf/overview.htm>>.

⁵⁶ Cal. Health & Saf. Code, § 25299.57(d)(3)(A).

⁵⁷ Because the Unified Program implemented by CUPAs is so new, Cal/EPA did not initially have a standard reporting format for enforcement data. As a result, in the following tables some CUPAs have blank entries or zeroes for particular datum. This does not mean that no enforcement actions were undertaken for the CUPA; instead, it means that the CUPA did not provide the information in a manner reportable by the Cal/EPA database (blanks) or

instituted 2,388 informal enforcement actions. These informal enforcement actions typically comprise notices of violations that require compliance by the UST operator. Where informal enforcement procedures were insufficient, the CUPA referred the matter for formal, civil enforcement. In fiscal year 1997-1998, civil referrals occurred 53 times. Ten matters were deemed so egregious that the CUPAs referred the matter for criminal enforcement. These enforcement actions resulted in \$164,585 in assessed penalties, of which the State collected \$94,487.

UST Enforcement Data for 1997-98						
Agency Name	Facilities with Violation Type UST	Informal Enforcement Actions	Civil Enforcement Actions and Referrals	Criminal Enforcement Actions and Referrals	Total Fines Penalties Assessed	Total Fines Penalties Collected
Alameda County Department Of Environmental Health		28				
Alpine County Health Department	0	0	0	0	\$0	\$0
Amador County Environmental Health Department						
Bakersfield City Fire Department	42	12	1	0	\$0	\$0
Berkeley City Toxics Management Division	4	4	1	0	\$0	\$0
Contra Costa County Hazardous Materials Program						
County Of Humboldt Environmental Health Division			0	0	\$0	\$0
County Of San Diego Department Of Environmental Health Services	1425			1	\$7,500	\$7,500
Del Norte County Department Of Health And Social Services	2	2	0	0	\$0	\$0
El Dorado County Environmental Health	0	12	12	0	\$0	\$0
El Segundo City Fire Department	0	0	0	0	\$0	\$0
Fremont City Fire Department						
Fresno County Health Department						
Gilroy City Fire Department	12	0				

that the information was not compiled by the CUPA in a manner that it could report to Cal/EPA (zeroes). Further, some CUPAs have not computerized their enforcement data and have not reported it to Cal/EPA for the most recently completed fiscal year. As a result, the CUPAs listed in the two accompanying tables are not identical.

UST Enforcement Data for 1997-98

Agency Name	Facilities with Violation Type UST	Informal Enforcement Actions	Civil Enforcement Actions and Referrals	Criminal Enforcement Actions and Referrals	Total Fines Penalties Assessed	Total Fines Penalties Collected
Glendale City Fire Department		39	1	1		
Hayward City Fire Department						
Healdsburg & Sebastopol City JPA		21	0	0	\$0	\$0
Hesperia City Fire Department		16				
Kern County Environmental Health Department	68	68	0	0	\$0	\$0
Kings County Environmental Health Services	8	8	0	0	\$0	\$0
Livermore-Pleasanton City Fire Department	8	8	0	0	\$0	\$0
Long Beach/Signal Hill JPA		225	0	0	\$0	\$0
Los Angeles County Fire Department	454	245	4	5	\$0	\$6,402
Madera County Environmental Health Department		25	1			
Marin County Office Of Waste Management	3	9	0	0	\$0	\$0
Mendocino County Environmental Health Department						
Merced County Environmental Health Division		4				
Mono County Health Department		3	1			
Monterey County Environmental Health Division		39	5	0	\$0	\$0
Napa County Environmental Management Department		0	0	0		
Nevada County Environmental Health Department		1				
Newark City Fire Department						
Oakland City Fire Department		1	0	0	\$0	\$0
Orange County Environmental Health Department	549	351	2			\$75,000

UST Enforcement Data for 1997-98

Agency Name	Facilities with Violation Type UST	Informal Enforcement Actions	Civil Enforcement Actions and Referrals	Criminal Enforcement Actions and Referrals	Total Fines Penalties Assessed	Total Fines Penalties Collected
Oxnard City CUPA	3	1	0	0	\$0	\$0
Petaluma City Fire Department	10	7	0	0	\$0	\$0
Placer County Environmental Health Department	5	5	0	2	\$0	\$0
Riverside County Environmental Health Department						
Roseville City Fire Department		43	0	0		
Sacramento County Environmental Management Department		16				
San Benito County Health Department		0	0	0		
San Bernardino County Fire Department	219	226	0	0	\$0	\$0
San Francisco City & County Department Of Public Health		70	0	0	\$0	\$0
San Joaquin County Environmental Health Division		218	3			
San Leandro City Fire Department			2			
San Luis Obispo County Environmental Health Division	8	8	0	1	\$0	\$0
San Mateo County Environmental Health Department		59	6	0	\$36,300	\$3,400
San Rafael City Fire Department		1				
Santa Barbara County Fire Department		47	7	0	\$0	\$0
Santa Clara City Fire Department	72					
Santa Clara County Department Of Environmental Health	19	19	0	0	\$0	\$0
Santa Cruz County Environmental Health Department		1	0	0	\$0	\$0
Santa Fe Springs Fire Department	4	240	0	0	\$785	\$185
Santa Monica City Environmental	0					

UST Enforcement Data for 1997-98

Agency Name	Facilities with Violation Type UST	Informal Enforcement Actions	Civil Enforcement Actions and Referrals	Criminal Enforcement Actions and Referrals	Total Fines Penalties Assessed	Total Fines Penalties Collected
Program Division						
Santa Rosa City Fire Department	2	2	0	0	\$0	\$0
Shasta County Environmental Health Department		50				
Siskiyou County Environmental Health Department	50	0	0	0	\$0	\$0
Solano County Environmental Health Services		90	0	0		
Sonoma County Emergency Services	27	27	0	0	\$0	\$0
Stanislaus County Environmental Resources	4	4	0	0	\$0	\$0
Union City Environmental Program	2	2				
Tulare County Environmental Health Department		85	6		\$120,000	\$2,000
Tuolumne County Environmental Health		8				
Ventura County Environmental Health Division	0	10	0	0	\$0	\$0
Vernon City Environmental Health		16				
Victorville City Fire Department	22				\$0	\$0
Yolo County Environmental Health Department	13	12	1	0	\$0	\$0
Total	3035	2388	53	10	\$164,585	\$94,487

The first complete fiscal year after the State Auditor's Report was fiscal year 1998-1999, and the number of enforcement actions increased significantly in that year. California's CUPAs instituted 4,153 informal enforcement actions. Eighty-two of the actions could not be resolved informally and were referred to the district attorney or city attorney county counsel for formal, civil enforcement. Another 23 cases were egregious enough to warrant criminal referrals. In fiscal year 1998-1999, the State assessed \$1,345,176 penalties, of which the State collected \$1,081,236.

UST Enforcement Data for 1998-99

Agency Name	Facilities with Violation Type UST	Informal Enforcement Actions	Civil Enforcement Actions and Referrals	Criminal Enforcement Actions and Referrals to UST	Total Fines Penalties Assessed	Total Fines Penalties Collected
Alameda County Department Of Environmental Health	12	0	0	0	\$0	\$0
Alpine County Health Department	0	0	0	0	\$0	\$0
Bakersfield City Fire Department	8	8	0	0	\$4	\$0
Berkeley City Toxics Management Division	7	3	0	0	\$0	\$0
Butte County Environmental Health Division	0	0	0	0	\$0	\$0
Calaveras County Environmental Health Department	4	4	2	1	\$0	\$0
Colusa County Environmental Health	3	13	0	0	\$0	\$0
County Of Humboldt Environmental Health Division	40	40	0	0	\$0	\$0
County Of San Diego Department Of Environmental Health Services	592	0	0	0	\$0	\$0
Del Norte County Department Of Health And Social Services	2	2	0	0	\$0	\$0
El Dorado County Environmental Health	35	60	0	0	\$0	\$0
El Segundo City Fire Department	0	0	0	0	\$0	\$0
Fremont City Fire Department	0	1	0	0	\$0	\$0
Fresno County Health Department	0	12	0	0	\$0	\$0
Gilroy City Fire Department	1	1	0	0	\$0	\$0
Glendale City Fire Department	68	61	3	0	\$0	\$0
Hayward City Fire Department	61	61	0	0	\$0	\$0
Healdsburg & Sebastopol City JPA	19	24	0	0	\$0	\$0
Hesperia City Fire Department	3	3	0	0	\$0	\$0
Imperial County	0	3	0	0	\$0	\$0
Kern County Environmental Health Department	276	276	1	1	\$0	\$0

UST Enforcement Data for 1998-99

Agency Name	Facilities with Violation Type UST	Informal Enforcement Actions	Civil Enforcement Actions and Referrals	Criminal Enforcement Actions and Referrals UST	Total Fines Penalties Assessed	Total Fines Penalties Collected
Kings County Environmental Health Services	7	6	1	0	\$0	\$0
Lake County Environmental Health Division		50	0	0	\$0	\$0
Livermore-Pleasanton City Fire Department	33	33	0	0	\$0	\$0
Long Beach/Signal Hill JPA	117	27	0	0	\$0	\$0
Los Angeles City Fire Department	48	46	1	1	\$0	\$0
Los Angeles County Fire Department	366	816	2	12	\$0	\$0
Madera County Environmental Health Department	0	15	1	0	\$0	\$0
Marin County Office Of Waste Management	3	3	0	0	\$0	\$0
Mariposa County Health Department	0	0	0	0	\$0	\$0
Mendocino County Environmental Health Department	96	0	0	0	\$0	\$0
Merced County Environmental Health Division		0	1	0	\$0	\$0
Modoc County	0	0	0	0	\$0	\$0
Mono County Health Department	10	10	0	0	\$0	\$0
Monterey County Environmental Health		32	1	0	\$0	\$0
Nevada County Environmental Health Department		3			\$0	\$0
Oakland City Fire Department	0	0	0	0	\$0	\$0
Orange County Environmental Health Department	471	112	27	0	\$1,000,120	\$880,120
Oxnard City CUPA	22	1	0	0	\$0	\$0
Petaluma City Fire Department	19	9	0	1	\$0	\$0
Placer County Environmental Health						

UST Enforcement Data for 1998-99

Agency Name	Facilities with Violation Type UST	Informal Enforcement Actions	Civil Enforcement Actions and Referrals	Criminal Enforcement Actions and Referrals UST	Total Fines Penalties Assessed	Total Fines Penalties Collected
Department						
Riverside County Environmental Health Department	64	64	0	0	\$0	\$0
Roseville City Fire Department		39				
Sacramento County Environmental Management Department		21	0	0	\$179,590	\$27,500
San Benito County Health Department	0	0	0	0	\$0	\$0
San Bernardino County Fire Department	413	490	1	0	\$0	\$0
San Francisco City & County Department Of Public Health	199	199	13	0	\$124,925	\$124,925
San Joaquin County Environmental Health Division		67	6	0	\$0	\$0
San Leandro City Fire Department	53	53	0	0	\$0	\$0
San Luis Obispo County Environmental Health Division	9	9	0	0	\$0	\$0
San Mateo County Environmental Health Department		24	6	3	\$37,497	\$37,497
San Rafael City Fire Department	1	1	0	0	\$0	\$0
Santa Barbara County Fire Department			0	0	\$0	\$0
Santa Clara City Fire Department	41	41	0	0	\$0	\$0
Santa Clara County Department Of Environmental Health	351	314	0	4	\$0	\$0
Santa Cruz County Environmental Health Department	4	4	0	0	\$0	\$0
Santa Fe Springs Fire Department	67	162	0	0		
Santa Monica City Environmental Program Division	0	0	0	0	\$0	\$0
Santa Rosa City Fire Department	3	3	1	0	\$0	\$0

UST Enforcement Data for 1998-99

Agency Name	Facilities with Violation Type UST	Informal Enforcement Actions	Civil Enforcement Actions and Referrals	Criminal Enforcement Actions and Referrals UST	Total Fines Penalties Assessed	Total Fines Penalties Collected
Shasta County Environmental Health Department	0	0	0	0	\$0	\$0
Sierra County Health Department	0	0	0	0	\$0	\$0
Solano County Environmental Health Services		163	0	0	\$0	\$0
Sonoma County Emergency Services	61	60	1	0	\$0	\$0
Stanislaus County Environmental Resources	0	0	0	0	\$0	\$0
Tehama County Environmental Health Department	0	0	0	0	\$0	\$0
Union City Environmental Program	16	16	0	0	\$0	\$0
Tulare County Environmental Health Department		45	10	0	\$0	\$8,150
Tuolumne County Environmental Health	1	7	0	0	\$0	\$0
Ventura County Environmental Health Division		461	2	0	\$3,044	\$3,044
Vernon City Environmental Health		10				
Victorville City Fire Department	15	0	0	0	\$0	\$0
Yolo County Environmental Health Department	0	165	2	0	\$0	\$0
Total	3621	4153	82	23	\$1,345,180	\$1,081,236

The above numbers do not include sites that are complying with investigation and corrective action orders dictated by the regulatory agencies. The 15,738 open cases in the LUSTIS system reflect the efforts of regulatory agencies to compel compliance with the UST Law and Corrective Action Regulations. In each case, the professional judgment of a local agency or Regional Water Board's staff makes the determination as to the level of effort presently necessary to investigate and to clean up a release from a UST site. Coupled with the CUPA enforcement numbers above, the record demonstrates an administrative will in California's disparate local, regional, and statewide agencies to enforce the UST Law, UST Regulations, and Corrective Action Regulations.

4. The Cited Excerpts from the California State Auditor's Report Do Not Constitute a Basis for the Development of a Factual Record.
 1. The Submission Ignores Enforcement Developments Subsequent to Issuance of the Auditor's Report.

To the large extent the submission relies on the 1998 California State Auditor's rReport, 98112 "California's Drinking Water" the submission ignores the substantial enforcement efforts and program revisions that have occurred since that time. Attached as Annex 3 hereto is the 60-day progress report prepared by Cal/EPA in response to the State Auditor's initial reports. The 60-day response details and identifies several interim measures taken by the Department of Health Services to address drinking water concerns and the State Water Board to implement the auditor's recommendations. Attached as Annex 4 hereto is California's 6-month response to the State Auditor's rReport. The submission does not take into account materials or events subsequent to issuance of the State Auditor's Report in December 1998. Its bald assertion that California has taken no steps to improve enforcement is demonstrably false.⁵⁸ is demonstrably false.

In addition, the submission does not account for California's MTBE Guidelines. The State Auditor's rReport indicated a need for the State to develop guidance for local agencies investigating releases of MTBE from UST sites to alleviate inconsistent efforts in cleaning up UST releases.⁵⁹ When the submission was filed, the California Legislature had enacted legislation to require the State Water Board to develop guidelines for investigating and remediating MTBE.⁶⁰ The law took effect on January 1, 2000 (after the submission was filed), and three months later the State Water Board released a final draft of the MTBE Guidelines. The MTBE Guidelines address many short-comings identified in the State Auditor's Report by identifying appropriate priorities and timelines for investigating releases of MTBE from USTs.⁶¹

2. Certain Allegations from the Auditor's Report Do Not Support An Article 14 Submission Because They Challenge The Underlying Legislation.

Methanex has cited the State Auditor's criticism of UST self-monitoring requirements as a basis for asserting that California does not enforce its UST Law, and that leaks are not discovered until the tanks are removed, rather than as part of an on-going monitoring program.⁶² As detailed above, California's UST regulatory scheme strives to prevent leaks. Monitoring is an important component of that regulatory scheme. Under the UST Law, an operator of a UST is

⁵⁸ Methanex submission at 12.

⁵⁹ See State Auditor's Report at 20-21; see also Methanex submission at 10.

⁶⁰ 1999 Cal. Stats. 812 (SB 989).

⁶¹ The State Water Board had previously issued guidance through its Executive Director on how to prioritize and to cease corrective action at certain UST sites where the release did not pose a threat to water resources (i.e., low-risk, soil-only sites). See, e.g., Walt Petit, State Water Board, letter to Interested Parties, Dec. 8, 1995 <<http://www.swrcb.ca.gov/cwphome/ust/lnl/petitltr.htm>>; see also, Lawrence Livermore National Laboratory, Environmental Restoration Division, *California Leaking Underground Fuel Tank (LUFT) Historical Case Analyses*, (November 16, 1995) <<http://www.swrcb.ca.gov/cwphome/ust/lnl/lnlplum.pdf>>.

⁶² Methanex submission at 9; State Auditor's Report at 24.

responsible for monitoring the UST to help ensure that it is not leaking.⁶³ Recently, the Legislature revised the UST Law to require enhanced leak detection at upgraded UST sites that may pose a higher risk to drinking water supplies.⁶⁴ In addition, self-monitoring has identified some releases and is supplemented by the enforcement program described in this memorandum and Annex 2. In any event, the cited criticisms of California's monitoring program do not allege a lack of enforcement. Instead, the criticisms reflect the realities of UST systems: not all releases can be detected by monitoring and leak detection.

For the same reason, the submission's reiteration that the UST Law and Regulations have not had the "desired outcome" and that gaps exist between the monitoring reports and the discovery of a release, even if true, does not reflect a lack of enforcement.⁶⁵ In an ideal world, USTs would never leak and there would never be releases from USTs. Unfortunately, the reality is that USTs do leak – even with aggressive enforcement of UST regulations. Even the most advanced leak detection system required by the UST Law for upgraded USTs (i.e., those USTs that do not have secondary containment through the UST system) will not detect leaks releasing less than 0.1 gallon per hour.⁶⁶ If the UST Law and UST Regulations have not had the "desired outcome," it is because enforcement alone cannot remedy all releases.

Moreover, the list of items identified in the submission (pages 10-11) does not indicate a lack of effective enforcement, but rather identifies mechanisms in which Cal/EPA agencies could improve their programs. In many instances, Cal/EPA accepted the State Auditor's recommendations and refined the programs accordingly.⁶⁷ See, Annexes 3 and 4. However, modifying procedures by which Cal/EPA monitors local agency adherence to certain requirements,⁶⁸ strengthening processes to obtain analytical data,⁶⁹ establishing a geographic information system,⁷⁰ and assisting in developing a geographic information system⁷¹ do not bear on whether the State's environmental laws have been enforced effectively. Instead, they reflect the State Auditor's wish list for revising the UST program and are not appropriate issues for the Articles 14 and 15 process.

3. The Alleged Failure to Be "Sufficiently Aggressive" in Taking Actions Against Individuals That Who violate Water Quality Laws Does Not Reflect The Site-specific Nature of UST Investigations and Corrective Action.

The State Auditor's Report concludes that the California regulatory agencies have not been "sufficiently aggressive" in taking actions under the UST Law. The submission reiterates this finding.⁷²

As the Corrective Action Regulations make clear, regulatory agencies must exercise a

⁶³ Cal. Health & Saf. Code, § 25293.

⁶⁴ Cal. Health & Saf. Code, § 25292.4.

⁶⁵ Methanex submission at 9-10.

⁶⁶ Cal. Code Regs., tit. 23, § 2643; *see also* 53 *Fed. Reg.* 37,159-160 (Sep. 23, 1988).

⁶⁷ *See* Annexes 3 and 4.

⁶⁸ Methanex submission at 10.

⁶⁹ *Ibid.*

⁷⁰ *Id.* at 11.

⁷¹ *Ibid.*

⁷² *Id.* at 9.

substantial amount of professional judgment in directing investigations at UST sites. After a release has been confirmed, the regulatory agency must direct the investigation and consider the appropriate corrective action. The local agencies and Regional Water Boards have a tremendous caseload in evaluating the 15,783 open UST cases. Because the Corrective Action Regulations require each investigation to be tailored to the needs of the site, and require the development of site-specific cleanup objectives that balance public health, safety, and the environment, each release entails significant staff time to evaluate the investigation and corrective action.

The large case load and the need to devote significant time to each case often requires regulatory agencies to prioritize cases and make judgment calls. Of the 15,783 open UST cases, many may not pose a substantial risk to California's water quality because of the quantity of hazardous substance released, the proximity to water resources, and the underlying geology of the site. The regulatory agencies must evaluate the cases to ensure that high risk sites are given priority. Necessarily, an agency may need to delay evaluating and requiring corrective action at lower risk sites. This flexibility exists in the Corrective Action Regulations and the UST Law, which do not require a specific timeframe for site investigation and corrective action. As a result, the regulatory agencies must exercise reasonable discretion, grounded in professional judgment based on the factors present at a site, in the deadlines set by the regulatory agency under the Corrective Action Regulations. In drafting the Agreement the Parties recognized that it was important for enforcement officials to reasonably exercise such discretion. They provided that a Party did not fail to enforce its environmental laws effectively because of action or inaction resulting from the reasonable exercise of enforcement discretion or *bona fide* decision to allocate resources.”⁷³

The United States respectfully submits that the State Auditor's suggestion that California agencies were insufficiently aggressive is misplaced. The Auditor based this conclusion on an unrepresentative sample of the overall agency caseload, failed to evaluate agency performance based on the information available to the agencies at the time decisions had to be made, and did not take into account the caseload-balancing that must be done at the regulatory-agency level.⁷⁴ In any event, even if more aggressive measures might have been appropriate in certain cases, that does not support a leap to concluding that California has failed to effectively enforce its environmental laws.

4. California Has Instituted Efforts for CUPAs to Identify USTs Lacking Required Permits to Bring the Facilities into Compliance with the UST Law.

California strives to ensure that only permitted USTs are operated in California and that

⁷³ NAAEC, Art. 45.1.

⁷⁴ This is equally true in the case of the State Auditor's report 97123 Lahontan Regional Water Quality Control Board, November 1998 ("Lahontan Audit"), cited by Methanex at 11. First, the submission mischaracterizes the report by intimating that the permits and monitoring reports discussed in the report concern USTs. Methanex submission at 11. Regional Water Boards do not issue permits to operate USTs: local agencies do. The report focuses on waste discharge requirements (i.e., permits) issued under the Porter-Cologne Act. Lahontan Audit at 11. The single UST case cited in the Lahontan Audit (*id.* at 22) and referenced in the submission (Methanex submission at 11) is exactly the type of case where hindsight is 20-20. The Regional Water Board pursued enforcement action, but not to the level the State Auditor felt was appropriate or warranted under the State Water Board's enforcement policy. Lahontan Audit at 22. More importantly, as the State Auditor acknowledged in its report, the Lahontan Regional Water Board has changed its enforcement practices to track State policy. *Id.* at 23.

abandoned USTs are properly closed. The submission asserts that “some tank owners and operators have not obtained required permits and would not be identified to state officials.”⁷⁵ As identified in Cal/EPA’s 6-month response to the State Auditor’s Report, Cal/EPA initiated training to help CUPAs identify unpermitted USTs,⁷⁶ which typically are inactive USTs that have not been closed pursuant to the UST Law.

Cal/EPA’s 6-month response to the State Audit’s Report notes specific efforts by the State Water Board to increase awareness of the unpermitted tanks. The primary focus of the State Water Board’s current initiatives regarding unpermitted USTs is identifying the UST. Local agencies have complained that once identified, the property owner may be slow to remove such tanks. Where appropriate, these actions are referred to local district attorneys to seek judicial action.

5. California Has Enforced the Upgrade Requirements.

The submission relies on data from September 30, 1998, for the proposition that only 18.5% of the regulated tanks had upgrade certificates.⁷⁷ This assertion, even if true, is irrelevant. The salient issue is how many USTs were either new or upgraded USTs as of the December 22, 1998 deadline. The State Water Board is not aware of any UST site that did not obtain the required upgrade certificate, self-certify to receive an upgrade certificate, or cease operation on the December 22, 1998, deadline.

Subsequent analysis by the State Water Board determined that as of September 1999, 87% of USTs met the State upgrade requirements.⁷⁸ The vast majority of the remaining USTs were temporarily closed as permitted by the UST Law and were not operating. Due to the high cost of complying with UST upgrade requirements, thousands of gasoline stations in California ceased operating in anticipation of the December 22, 1998, deadline. Many of the USTs at these shuttered facilities were placed in temporary closure while the owner and operator awaited permanent closure and UST removal requirements. Any fraction of USTs not properly upgraded, not temporarily closed, or not closed are being investigated and the UST law is being enforced as detailed above.

By the December 22, 1998, upgrade deadline California believes that more than 99% of the USTs in regular operation were either new USTs or upgraded USTs in compliance with applicable laws. In the few instances when non-compliant tanks were found, they were immediately shut down. As indicated in the enforcement information provided above, some of those cases have resulted in judicial enforcement actions.

The upgrade requirements strained the resources of both regulators and the regulated community. Owners and operators spent approximately \$18,000 upgrading each existing UST to meet the upgrade requirements (or approximately \$43,000 per 3-tank UST facility). The Legislature was aware that there may not be enough regulators to review all the upgrade work that was done in the final months of 1998. As a result, the California Legislature created a self-certification process whereby in counties that had insufficient resources to inspect all upgrades,

⁷⁵ Methanex submission at 9.

⁷⁶ Annex 4 at 2.

⁷⁷ Methanex submission at 9.

⁷⁸ <http://www.swrcb.ca.gov/~cwphome/ust/tank_stats.htm>.

owners and operators could self-certify that their USTs were compliant for up to 90 days until the CUPA could issue an upgrade certificate.⁷⁹ Contrary to the implication in the submission,⁸⁰ California did not provide waivers for non-complying tanks to allow them to continue taking delivery of gasoline. In fact, California explicitly refused to grant waivers from the State's upgrade requirements.⁸¹

6. California Has Not Extended the Time to Comply with State and Federal UST Laws.

Methanex asserts that "a careful reading of Executive Order D-5-99 . . . indicates an intention to permit a further more than eleven years for tank owners and operators to bring their tanks into compliance with state and federal law."⁸² This assertion betrays a profound misunderstanding of the Governor's Executive Order and California's regulatory scheme. The only paragraph of the Executive Order that has an event eleven years after the Oorder is paragraph 9. Paragraph 9 of the Executive Order requires in toto:

"The State Water Resources Control Board shall seek legislation to extend the sunset date of the Underground Storage Tank Cleanup Fund to December 31, 2010. The proposed legislation would increase the reimbursable limits for MTBE groundwater cleanups from \$1 million to \$1.5 million."⁸³

Executive Order D-5-99, para. 9. As explained above, the Cleanup Fund is a mechanism to help fund the investigation and cleanup of releases from USTs. A predicate to receiving funds is that the owner or operator of the UST must be in compliance with all applicable UST laws and regulations. There is no conceivable manner in which paragraph 9 can be construed to provide UST owners until December 31, 2010, to comply. Instead, paragraph 9 simply makes available an additional \$1 billion⁸⁴ through the Cleanup Fund to reimburse investigation and corrective action costs statewide, and thereby protect California's water resources.

7. California Has Undertaken Substantial Additional Efforts to Enforce the UST Law.

Prior to the State Auditor's Report, California's regulatory agencies were committed to enforcing the UST Law. Since the State Auditor's Report, California's regulatory agencies have substantially increased their enforcement activities.

California strongly believes that enforcement does not simply entail initiating prosecutions and assessing fines against owners and operators. The UST Law and Regulations are very complex and the costs of complying with the laws are substantial. Further, violation of the UST Law, UST Regulations, or Corrective Action Regulations can jeopardize up to \$1.5 million in assistance available to each owner or operator under the Cleanup Fund Act. If a local agency identifies a problem, such as a joint fitting that has become loose or incompatible

⁷⁹ Cal. Health & Saf. Code, § 25284(g).

⁸⁰ See Methanex submission at 9.

⁸¹ <http://www.swrcb.ca.gov/cwphome/ust/epa_news.htm#Small>.

⁸² Methanex submission at 9.

⁸³ Executive Order D-5-99, para. 9.

⁸⁴ This figure assumes an additional six years beyond the Cleanup Fund's previous sunset date of January 1, 2005, and an addition \$170 million in reimbursements per year.

materials in the UST system, the cost to repair the system can easily exceed \$10,000 because of the need to break concrete to make certain repairs, the cost of the special equipment, and the need for licensed installers. It is not unusual for compliance costs to exceed \$50,000. These costs come on top of costs between \$18,000 and \$43,000 to upgrade a typical UST facility or \$60,000 to \$200,000 to install new USTs at a facility to meet upgrade requirements. These are direct costs and do not reflect any lost profits the operator may suffer while the UST system is shut down. As a result, CUPAs frequently issue compliance tickets that do not contain a monetary assessment, so long as the operator complies with the UST Law by a fixed date. A compliance ticket reflects the reasonable exercise of discretion by the regulatory agencies.

8. The Submitter Has Made No Effort to Pursue a Remedy to its Grievances under Applicable Provisions of California Law.

Article 14.3(b)(ii) of the NAAEC invites Parties to advise the Secretariat of “whether private remedies in connection with the matter are available to the person or organization making the submission and whether they have been pursued.” Under the California Water Code and to a lesser degree the California Health and Safety Code there is a process by which a person can petition the State Water Board or a Regional Water Board to pursue a particular course of action.⁸⁵ Petitions under the provisions can challenge an action or failure to act by a Regional Water Board or a LOP. To the extent the State Water Board or a Regional Water Board denies a petition, the denial may be subject to judicial review. Methanex, for example, could petition the State Water Board to enforce or to require enforcement of the UST Law, UST Regulations, or the Corrective Action Regulations. To date, Methanex has not sought enforcement or alleged that California is failing to enforce its UST Law utilizing this state process.

Methanex’s only assertion in this regard is that it provided to California’s Governor a copy of a five-point plan it developed for protecting the environment. The only provisions in the five-point plan that are relevant to the submission are is point three, proposing “more effective enforcement and regulatory programs to prevent the release of gasoline to the environment” and point four proposing “more aggressive gasoline and MTBE remediation and treatment efforts and increased funding to support remediation and treatment research and development.”⁸⁶ Methanex’s Five-Point Plan on gasoline, MTBE, and the environment at 2. The letter to the Governor would not trigger any of the state review processes.

Any state review process would have required the submitter to identify the relevant provisions of the UST Law, UST Regulations, or Corrective Action Regulations that were purportedly not enforced. Such a process would have narrowly focused the issues permitting a reasonable opportunity for dialog and resolution. Instead, by using the Article 14 process, the submitter has relied on non-specific references to the entire UST Regulations and the Water Code in an effort to generate an unbounded factual inquiry.⁸⁷ While the petition process before the appropriate state agencies could have resulted in an enforceable order with a meaningful opportunity to improve enforcement where the submitter could demonstrate a lack of enforcement, the Article 14 submission cannot provide such relief. Instead, the Article 14

⁸⁵ Cal. Water Code, § 13320, Cal. Health & Saf. Code, § 25297.1.

⁸⁶ Methanex’s Five-Point Plan on gasoline, MTBE, and the environment at 2.

⁸⁷ Preparation of a factual record under these circumstances would be a daunting task, as it would necessarily involve consideration of a myriad of laws and regulations as well as their application by California’s 69 CUPAs, 15 non-CUPA counties, 9 Regional Water Boards, and the State Water Board.

process can only provide the submitter the benefit of a factual record to use in its NAFTA Chapter 11 action.

California Has Undertaken Substantial Additional Efforts To Enforce The UST

Prior to the State Audit Report, California's regulatory agencies were committed to enforcing the UST Law. Since the State Audit Report, California's regulatory agencies have undertaken numerous, additional enforcement activities.

California strongly believes, however, that enforcement does not simply reflect initiating prosecutions and assessing fines against owners and operators. The UST Law and UST Regulations are very complex and the costs of complying with the laws are substantial. Further, violation of the UST Law, UST Regulations, or Corrective Action Regulations can jeopardize up to \$1.5 million in assistance available to each owner or operator under the Cleanup Fund Act. If a local agency identifies a problem, such as a joint fitting that has become loose or incompatible materials in the UST system, the costs to repair the system can easily exceed \$10,000 because of the need to break concrete to make certain repairs, the costs of the special equipment, and the need for licensed installers. It is not unusual for compliance costs to exceed \$50,000. These costs come on top of costs between \$18,000 and \$43,000 to upgrade a typical UST facility or \$60,000 to \$200,000 to install new USTs at a facility to meet upgrade requirements. These are direct costs and do not reflect any lost profits the operator may suffer while the UST system is shut down. As a result, CUPAs frequently issue compliance tickets that do not contain a monetary assessment, so long as the operator complies with the UST Law by a fixed date. A compliance ticket reflects the reasonable exercise of discretion by the regulatory agencies.

6. CONCLUSION

Although the U.S. Government is a firm supporter of the public submission process established under Articles 14 and 15, the Secretariat should not request authorization for development of a factual record in this case. First, the matter is already the subject of a "pending judicial or administrative proceeding" under Article 14.3(a), which proscribes the Secretariat from proceeding further. Methanex must not be allowed to twist the Articles 14 and 15 process into a mechanism for furthering its NAFTA arbitration claim. Second, Methanex's undifferentiated claim that the State of California is failing to effectively enforce its environmental laws relating to underground storage tanks is belied by the vigorous enforcement program now being carried out by the State.